

<b>The Point 128 LLC v Choi</b>
2020 NY Slip Op 30016(U)
January 3, 2020
Supreme Court, New York County
Docket Number: 652887/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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THE POINT 128 LLC,  
  
Plaintiff,

- v -

JOANNÉ CHOI, WILLIAM CHOI, KENNETH TAM, MZ GLOBAL  
LLC, AND 8TH AVE ENT LLC.  
  
Defendant.

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INDEX NO. 652887/2019

MOTION DATE \_\_\_\_\_

MOTION SEQ.  
NO. 002

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 were read on this motion to/for MISCELLANEOUS

In Motion Sequence Number (Motion) 002, defendants move, pursuant to CPLR 4547, CPLR 3024, and the confidentiality stipulation and order in the related action (*Choi v Wu*, 651716/2018) (Related Action), to strike exhibits D and E to plaintiff's papers in opposition to Motion 001, defendants' motion to dismiss the complaint. Defendants further seek to strike/omit all references to those two exhibits (NYSCEF 46 [order to show cause]).

Exhibit D to plaintiff's opposition to Motion 001 (Exhibit D) is an appraisal report, dated September 6, 2017, for real property located at 20-07 127<sup>th</sup> Street in College Point, New York (Report) (NYSCEF 21). The appraisal report contains valuation opinions regarding "the land, the improvements thereto, and the contributory value of the furniture, fixtures & equipment," and "assume[s] that the hotel will be, and shall remain, open and operational" (*id.* at 4). According to

prior counsel to the parties, the Report was authorized by plaintiff's board of directors to be created for settlement purposes (NYSCEF 35 at 2).

Exhibit E to plaintiff's Motion 001 opposition (Exhibit E) is an email chain from May to June 2019 including a settlement proposal for the Related Action (NYSCEF 22). The email in Exhibit E states that "[t]his e-mail as well as the information contained herein and attached hereto are in furtherance of settlement, confidential, and protected under CPLR 4547" and includes the Related Action plaintiffs' written proposal to settle that case (*id.* at 2-3).

Each of the defendants in this action are plaintiffs in the Related Action, and plaintiff in this action is a defendant in the Related Action. For clarity in this decision, plaintiff, The Point 128, LLC, is referred to as Point 128 and defendants are referred to simply as defendants.

Defendants assert that Exhibits D and E (together, Exhibits) are prohibited from being used by Point 128 in opposition to Motion 001 under CPLR 4547 as those documents are intended to be offered as proof of alleged liability of the claim. They further assert that CPLR 3024 bars Point 128's use of Exhibits D and E as they are not included in, attached to, or referenced in the complaint and are effectively a "salacious and/or prejudicial" attempt to amend the pleading to include the Exhibits (NYSCEF 45 at 10 [defendants' mem supp, Motion 002]). Defendants thus argue that the Exhibits should be stricken because they are inadmissible at trial and irrelevant.

Point 128 responds that CPLR 4547 does not preclude the use of the Exhibits as they were filed "as evidence of independent violations unrelated to the underlying claim which was the subject of the correspondence" (NYSCEF 49 [Point 128's mem opp, Motion 002]). That is, the Exhibits are relevant to the claims raised in this action (e.g., an independent breach of the operating agreement), which are distinct from those raised in the Related Action. Specifically, Point 128

argues that this action seeks relief for defendants' allegedly improper attempt to commence and use the Related Action to leverage/pressure a greater buy-out price for their interest in defendant-company, Point 128, as well as the hotel business located on the real property owned by Point 128, Hotel De Point (Hotel). The Hotel and real property assets are the subject of the Report's appraisal (see generally NYSCEF 21). Point 128 further argues that the Report is admissible as it was made by a third-party in the ordinary course of business.

The court agrees with defendants that the Exhibits fall within the ambit of CPLR 4547 and are precluded from being used in connection with Motion 001.

In addressing a challenge to documents under CPLR 4547, "[t]he central question for the court [is] why [the party] sought to admit the [settlement] statement. If it [is] being offered because it contain[s] a factual admission by [the adversary], that use [is] allowed, whether or not 'the statement [wa]s contained in a settlement document' " (*PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 AD3d 559, 560 [1st Dept 2013] [ninth alteration in original], quoting *Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165, 165 [1st Dept 1986], *lv dismissed* 68 NY2d 807 [1986] [permitting use of settlement document for party's admission that it was properly served]). "If, however, the mediation statement was 'prepared [solely for purposes of] settlement discussions' and thus was not being offered for its factual content, admission would [be] improper" (*id.* [first alteration in original], quoting *D.B. Zwirn Special Opportunities Fund, L.P. v Brin Inv. Corp.*, 96 AD3d 447, 448 [1st Dept 2012] [excluding a spreadsheet prepared for settlement purposes]).

In *PRG Brokerage Inc.*, the First Department found that the trial court correctly excluded a "mediation memorandum, which was created by plaintiff in a prior litigation for purposes of settlement discussions" (107 AD3d at 559-560). Here, as in *PRG Brokerage Inc.* and *D.B. Zwirn*, the

Exhibits were prepared solely for the purposes of settlement negotiations in the Related Action and, accordingly, they are excluded from Point 128's opposition to Motion 001 (CPLR 4547; NYSCEF 35 [2017 email from Point 128's counsel stating that Point 128's board "will . . . agree to accept, review and consider (the Report) for settlement purposes"]; see generally NYSCEF 21-22 [Exhibits created for settlement negotiations]). In any event, the Exhibits do not contain factual admissions such as those that would, under other circumstances, warrant permitting the court to consider the settlement documents in resolving Motion 001.

The court has examined the parties' remaining arguments and, to the extent that they are properly before the court and/or have not been waived or abandoned, the court finds them unavailing, without merit, or otherwise not requiring an alternate result. Thus, the court excludes the Exhibits and all references to those documents in resolving Motion 001. The court will not, however, order that the exhibits be removed from the record given that they were publicly-available on NYSCEF for approximately two weeks before this motion was made and defendants did not formally seek exigent emergency relief, such as by the filing of a proposed order to show cause requesting a temporary restraining order or other immediate relief, to remove those documents from the docket or to seal them from public view.

Accordingly, it is

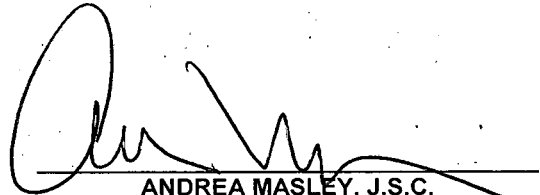
ORDERED that Motion 002 is granted in part; and it is further

ORDERED that Exhibits D and E to plaintiff The Point 128, LLC's submissions in opposition to defendants' motion to dismiss (Motion 001), and any references to those documents, will be excluded from the court's consideration in resolving Motion 001; and it is further

ORDERED that the parties shall appear for their next conference at 11<sup>30</sup> AM/PM on

1/14/2020 in Part 48.

1, 3 /20 20  
DATE



ANDREA MASLEY, J.S.C.  
**HON. ANDREA MASLEY**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE